(2)

Office-Supreme Court, U.S.
FILED
JAN 25 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1012

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

EUGENE HANEY, Administrator of the Estate of Freddie Lee Mayes - - - Petitioner

versus

CITY OF LOUISVILLE, KENTUCKY, LOUISVILLE DIVISION OF POLICE, OFFICER GERALD KALBFLEISCH, OFFICER DALE LANKFORD, OFFICER EVERETT PIKE, SERGEANT GENE WALDRIDGE - - Respondents

---

On Writ of Certiorari to the Kentucky Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

GEORGE S. SCHUHMANN
Counsel of Record
PAUL V. GUAGLIARDO
SAMUEL MANLY
Room 200
Louisville City Hall
Louisville, Kentucky 40202
(502) 587-3511
Counsel for Respondents

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

36 pp

QUESTIONS PRESENTED FOR REVIEW

This is a wrongful death action alleging negligent or excessive use of force by police officers in the process of arresting Freddie Mayes pursuant to a mental detention warrant. The issues presently before this Court are:

1. Whether a constitutional question is presented.

2. Whether a constitutional question was raised in the Courts below.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
I. Counterstatement of the Case	1– 5
II. Summary of Argument	5
III. Argument	5–13
A. No Genuine Federal Question Is Presented on the Merits	5– 9
B. The Question Now Sought to be Reviewed Was Not Presented to the Courts Below	9–13
IV. Conclusion	13
Appendix	1a–17a

TABLE OF AUTHORITIES

Cases:

	PAGE
Baker v. *McCollan*, 443 U. S. 137 (1979)	6
Cardinale v. *Louisiana*, 394 U. S. 437 (1967)	10
Crowell v. *Randell*, 10 Pet. 368 (1816)	10
Estelle v. *Gamble*, 429 U. S. 97 (1977)	6
Hudson v. *Palmer*, 468 U. S. ____, 82 L. Ed. 2d 393 (1984)	6
Landrum v. *Moats*, 576 F. 2d 1320 (8th Cir. 1978)	8
McQurter v. *City of Atlanta*, 572 F. Supp. 1401 (N.D. Ga. 1983)	6, 7
Owings v. *Norwood's Lessee*, 5 Cranch 344 (1809)	10
Palmer v. *Hall*, 380 F. Supp. 120 (M.D. Ga. 1974)	8
Parratt v. *Taylor*, 451 U. S. 527 (1981)	6
Paul v. *Davis*, 424 U. S. 693 (1976)	6
Webb v. *Webb* at 451 U. S. 501	12–13
Williams v. *Kelly*, 624 F. 2d 695 (5th Cir. 1980)	7, 8

Constitutional Provisions, Statutes and Rules:

Amendments of the United States Constitution	
Fourth	5, 8
Fifth	5, 9
Sixth	5, 8
Fourteenth	5, 9
28 U.S.C. § 1257(3)	9
42 U.S.C. § 1983	5, 7, 8
42 U.S.C. § 1988	5, 8
KRS 202A.050	1
Supreme Court Rule 17.1(c)	9, 13
Supreme Court Rule 21.1(h)	10, 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1012

EUGENE HANEY, Administrator of the Estate of Freddie Lee Mayes - - *Petitioner*

v.

CITY OF LOUISVILLE, KENTUCKY,
LOUISVILLE DIVISION OF POLICE,
OFFICER GERALD KALBFLEISCH,
OFFICER DALE LANKFORD,
OFFICER EVERETT PIKE,
SERGEANT GENE WALDRIDGE - - *Respondents*

ON WRIT OF CERTIORARI TO THE
KENTUCKY SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I. COUNTERSTATEMENT OF THE CASE

On October 8, 1977, Sharon Bradley, with the assistance of her mother, Georgia Smith, obtained an arrest warrant for Freddie Mayes pursuant to KRS 202A.050 on the grounds that Mayes was mentally incompetent and presented a danger to himself and others and was acting in an extremely violent manner (See, Petitioner's Appendix, Exhibit D). In addition to the sworn description of Mayes as violent and dangerous,

he was identified for purposes of the warrant as being a male weighing 350 pounds and 6′2″ in height. He was thirty-four years old.

When the warrant was not served the night of October 8th, Ms. Bradley called the police headquarters and asked that it be served as soon as possible. In the course of this phone call, she reiterated that her brother Mayes was "dangerous" and that he would not willingly submit to arrest. (Defendant's Trial Exhibit #4 — Tape recorded conversation played to the Jury and located in the Transcript of Evidence at T.E. 1753).

When the police received the warrant, they took into consideration Mayes' imposing size and the stated information that he was mentally incompetent, violent and dangerous. Sergeant Gene Waldridge was the commanding officer who received the warrant, and he decided to use four patrol officers to serve the warrant. Among these officers, Officer Pike was the most senior and experienced in serving mental detention warrants. Officer Pike was designated to be the lead officer in trying to effect a peaceable arrest (T.E. 359). In contrast to Mayes' imposing size, Officer Pike was smaller, being 170 pounds (T.E. 387) and was more mature being a 26-year veteran of the police force.

When the police officers arrived at the place of Mayes' residence, they made repeated efforts to persuade Mayes to submit to arrest and go to the hospital voluntarily. Officer Pike even volunteered to return Mayes from the hospital if the doctors there decided not to keep Mayes (T.E. 363, 396). In response to this

Mayes indicated that he would not go to the hospital. After several minutes of colloquy regarding this matter and attempts to persuade Mayes to submit to arrest, it was apparent that Mayes would not comply with the officers' requests, and Officer Pike attempted to take hold of Mayes' arm. Mayes just threw the officer away (T.E. 396).

A scuffle ensued as the officers tried to gain physical control of Mayes. In the course of the struggle which occurred in the living room of Georgia Smith's residence, Mayes fell into a large chair but continued his efforts to resist the officers. At that stage of the struggle, Officer Kalbfleisch used his nightstick from behind the seated Mayes, bringing the stick under Mayes' chin and pulling upwards. The nightstick hold was applied approximately three to five minutes during which times Mayes continued his struggling. As soon as the officers were able to get handcuffs on Mayes this hold was released (T.E. 1725). During this period, and unknown to the officers, Mayes regurgitated some of his stomach contents and inhaled it into his airways. The position of Mayes' head, neck and tongue precluded vomiting outward (T.E. 1161). Therefore the police officers were unaware at the time of what was wrong with Meyes (T.E. 1173).

As Mayes finally ceased his resistance to the officers, he lapsed from consciousness. Upon noting this unusual development (loss of consciousness) Sergeant Waldridge immediately radioed for assistance from the Louisville Emergency Medical Services. The tran-

scripts of the radio calls relating to this period of time indicate that the police arrived at the scene of the Mayes' residence at 4:01 p.m. on October 9, 1977, a call went out for additional police help at 4:08 p.m., and a call went out for EMS services at 4:11 p.m.

When EMS arrived at the scene, Mayes was unconscious. Efforts were made to revive him, but Mayes did not respond and was pronounced dead on arrival at the hospital. The cause of death was subsequently determined on autopsy by Dr. George Nichols, Chief Medical Examiner for the Commonwealth of Kentucky, to be asphyxia as a result of aspiration of gastric contents (T.E. 1154)—essentially meaning that Mayes suffocated as a result of vomit which he drew into his windpipe and lungs causing his breathing to be blocked. Dr. Nichols' unrebutted testimony established that only a mild degree of force was applied to Mayes' neck (T.E. 1169-1170). In fact it was unrebutted that death did not result from a compression of Mayes' airway (T.E. 1177-78); and none of the injuries received by Mayes in the course of his struggle was life threatening (T.E. 1180). The medical testimony also indicated that no one would have anticipated that Mayes would vomit because of the position of his neck or the nightstick (T.E. 1186).

The case was tried before a jury from October 20th through November 2, 1981. The jury rendered its verdict in favor of all defendants, the City of Louisville and its police officers. The Trial Court overruled Movant's motions for a new trial and for judgment

notwithstanding the verdict. The judgment of the Trial Court was affirmed by the Kentucky Court of Appeals, and discretionary review was denied by the Kentucky Supreme Court.

II. SUMMARY OF ARGUMENT

The decision below dealt with the alleged tort of wrongful death. No constitutional issues were raised or ruled upon in the trial court, and the arguments and authorities of the Petitioner raise no genuine federal issue at this time.

III. ARGUMENT

A. No Genuine Federal Question is Presented on the Merits

The case at bar is a wrongful death action brought in state court under general tort law of Kentucky. Petitioner alleged excessive force by the respondent-officers. The jury, after being instructed on the law regarding the amount of force that may be used to effectuate an arrest, returned a verdict for all Respondents.

This is not, and never was, an action for deprivation of civil rights brought in state court under 42 USC §§ 1983 and 1988. Yet Petitioner now argues that the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution "*should* prohibit the use of deadly force or force liable to cause great physical injury by police officers on a mentally ill person in order to effect his arrest for hospitalization pursuant to a mental detention warrant." (Petitioner's Brief, pg. 7, Emphasis Added.)

Significantly, Petitioner cites to no decision of the United States Supreme Court to support his argument. Petitioner obviously hopes that the Court will elevate a simple state tort to a constitutional level.

Petitioner's suggestion should fail for a number of reasons. Even if a federal question has been properly preserved, which Respondents dispute in part B of this Argument, there is no basis for asserting a constitutional deprivation in this case. This Court has consistently attempted to remove common law torts from the scope of constitutional adjudication, *Paul* v. *Davis,* 424 U. S. 693 (1976) (no cause of action for loss of reputation), *Estelle* v. *Gamble,* 429 U. S. 97 (1977) (medical malpractice to prisoners is insufficient, there must be "deliberate indifference" to medical needs), *Baker* v. *McCollan,* 443 U. S. 137 (1979) (wrongful arrest based on misidentification) especially when post-deprivation due process is available under state law, *Parratt* v. *Taylor,* 451 U. S. 527 (1981) (negligent loss of property does not involve a constitutional deprivation when post-deprivation due process is available under state law) and *Hudson* v. *Palmer,* 468 U. S. ____, 82 L. Ed 2d 393 (1984) (*Parratt* applied to unauthorized *intentional* deprivation of property).

Petitioner's appeal should fail both on the law and on the facts of this case. In the case at bar, the jury found that the officers used no more force than was necessary or appeared to the officers in the exercise of reasonable judgment to be necessary in order to effect the arrest of Mr. Mayes. Petitioner's reliance upon *McQurter* v. *City of Atlanta,* 572 F. Supp. 1401

(N.D. Ga. 1983) is misplaced. In *McQurter,* the trier of fact concluded that the force used to effectuate the arrest was excessive and further concluded that the force used and the injury inflicted (death) amounted to a constitutional deprivation. (The City of Atlanta's appeal to the Eleventh Circuit was dismissed for failure to file a timely notice of appeal, 724 F. 2d 881 (11th Cir. 1984).

In the case at bar, however, the uncontradicted testimony of the examining pathologist, Dr. George Nichols, clearly showed that none of the injuries sustained by Mr. Mayes was foreseeably life threatening. In Dr. Nichols' words:

> "None of the injuries were in any way going to cause a life threatening problem for the individual, in fact, none of the injuries that I saw would have caused any more medical treatment than five sutures. (T.E. 1180)

According to Dr. Nichols, Mr. Mayes' death was not reasonably foreseeable:

> "I don't think the casual observer or anyone would anticipate that he [Mayes] was going to vomit because of the positioning of the neck or the club. (T.E. 1186)

Based on its review of all the evidence, the jury obviously agreed. The case, then, is more akin to another Atlanta choke-hold case, *Williams* v. *Kelly,* 624 F. 2d 695 (5th Cir. 1980), where the Court (now the Eleventh Circuit) in a § 1983 action affirmed the holding of the trier of fact that the application of a choke-

hold was not constitutionally tortious in that situation even when death resulted. The court suggested that the constitutionality of a defendant's conduct rests on a number of factors such as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. *Williams, Supra.* at 697.

The other two federal cases which Petitioner cites are simply not on point. *Palmer* v. *Hall,* 380 F. Supp. 120 (MD Ga 1974) dealt with deadly force used against fleeing misdemeanants and *Landrum* v. *Moats,* 576 F. 2d 1320 (8th Cir. 1978) concerned the use of deadly force against a fleeing felon. The case at bar, however, involves a distinguishable fact situation in the attempted arrest under warrant of a large, physically strong man; the use of force was not deadly per se or, based on the medical testimony, not likely to have caused death; the decedent refused to submit to arrest and forceably attempted to resist; and the officers were in fear for their own safety under the circumstances. To the extent the existence of a constitutional deprivation depends on the facts, the jury in the case at bar has clearly found in the Respondents favor.

Finally, even if this case had been properly brought under 42 USC § 1983 and 1988, it strains current interpretation of the Constitution to suggest that the Fourth and Sixth Amendments are implicated based on the facts. No challenge to the validity of the mental

detention warrant has ever been made nor was Mr. Mayes' right to counsel implicated. It is similarly likely that Petitioner's reference to the Fifth and Fourteenth Amendments is also in error. Mayes' petition completely fails to articulate a basis for his broad claims.

B. The Question Now Sought to be Reviewed Was Not Presented to the Courts Below.

The appellate jurisdiction of the Supreme Court in this case is grounded upon 28 U.S.C. § 1257 (3), which provides for review of a decision rendered by the highest court of a state by writ of certiorari ". . . where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of . . . the United States." The considerations governing the exercise of jurisdiction are set out in Rule 17.1(c) of this Court to include a decision by a state court of an important question of federal law which should be settled by this Court or a decision in conflict with applicable decisions of this Court. Thus, a twofold consideration is taken of the matters in which a party seeks certiorari; first, there is the jurisdictional test of which matters may be reviewed; and, second, there is the discretionary issue of which matters within the Court's jurisdiction ought to be reviewed.

Since the whole purpose of review of a decision implies that the Court whose decision is to be reviewed made a decision to some particular effect, a necessary requirement of such review is that the federal ques-

tion must have been duly raised in the state court. Where such a question has not been raised—and therefore was not decided by the Court below—the claim has not been "specially set up" as required by § 1257 and jurisdiction does not lie. That principle has long found expression in the decisions of this Court. See, *Owings* v. *Norwood's Lessee,* 5 Cranch 344 (1809); *Crowell* v. *Randell,* 10 Pet. 368 (1816); *Cardinale* v. *Louisiana,* 394 U. S. 437 (1967); and *Webb* v. *Webb,* 451 U. S. 493 (1981).

In order to address these requirements, Supreme Court Rule 21.1(h) requires that the Petitioner for certiorari specify, "both in the Court of first instance and in the appellate Court," the stage of the proceedings at which the federal question was raised.

In the case at bar, the requirement of Rule 21.1(h) has not been met; nor can it be met. The issue which the Petitioner raises in this forum was not raised in the trial court and was not pursued in the appellate courts. To support these contentions we have provided copies of Mayes original and amended complaints in the court of first instance. See Respondent's Appendices A and B, *infra.* Clearly the complaint raised only a wrongful death action without alleging the deprivation of any federal right. That is how the case was practiced in the trial court, as can be seen from the form of instructions tendered by Mayes, see Appendix C, *infra.* No federal right was invoked by the Petitioner at the Trial Court stage of these proceedings.

Mayes' petition for certiorari attempts to ignore this failure and presents two excerpts from the briefs

to the Kentucky appellate courts in an attempt to show the issue now presented to this Court was raised below. See, Petitioner's Appendices E and F. A closer examination of those materials rebuts any notion that the state appellate courts were presented with a federal issue. The required Introduction to Mayes' brief in the Kentucky Court of Appeals describes the case as a wrongful death action without reference to any federal rights, see Appendix D-1, *infra.* The table of contents of that brief sets up the nine issues then raised by Mayes, see Appendix D-2, *infra.* Not one of those issues raised a federal question. Mayes makes bold to take a paragraph out of context and points to it as the place where the federal issue was preserved. However, an examination of that material in context shows that Mayes was not preserving the issue. See, Appendix D-3, *infra,* for the full context of Mayes argument. That argument addressed the Trial Court's instructions to the effect that the arresting police officers were entitled to use "reasonable" force to effect the arrest. This was the principal issue addressed by the Kentucky Court of Appeals in its opinion which affirmed the decision of the Trial Court. That opinion appears as Mayes' Appendix Exhibit B. Mayes did not thereafter press that Court for a ruling on any federal question.

Nor did Mayes ask the Kentucky Supreme Court to rule on a federal issue. The excerpt from its Motion for Discretionary Review to that Court is again removed from its proper context by Mayes in order to make it appear that such an issue was raised. A full

showing of that portion of the Motion discloses that the argument actually presented to the state Supreme Court relates to the jury instructions and the applicable role of state tort law. See Appendix E, *infra.*

Thus a review of the actual course of this appeal discloses that Mayes did no more than make sweeping reference to federal rights in an attempt to be more persuasive in arguing about the state rule of law pertaining to the use of force in the course of an arrest. Five sentences were presented to the Kentucky Court of Appeals, and three sentences were presented to the Kentucky Supreme Court. No specific federal issue was framed for those courts; and, therefore, no ruling was made by them regarding federal rights.

As stated in *Webb* v. *Webb* at 451 U. S. 501:

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

In *Webb* the Court carefully addressed and articulated the reasons for requiring that the federal issue be presented first to the state courts, as stated therein:

> These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

Since the requisite presentation of the issue now sought to be ruled upon was not made below, the appropriate response to Mayes' petition is to deny review at this level. In fact, the Petitioner's blatant abuse of the review process and his manner of raising the belated federal issue are so frivolous as to justify an appropriate order awarding the Respondents their reasonable attorneys fees for this portion of the proceedings.

IV. CONCLUSION

It is respectfully submitted that the Petitioner has clearly failed to establish compliance with the requisites of Rule 17.1(e) and Rule 21.1(h). The decision below neither addressed nor ruled upon a federal question. The state court properly applied state law as determined by the Kentucky Court of Appeals, and there is no important question of Federal law to be reviewed in this instance.

Respectfully submitted,

GEORGE S. SCHUHMANN
Room 200
Louisville City Hall
Louisville, Kentucky 40202
(502) 587-3511
Counsel for Respondents

APPENDIX

PAGE

A. Complaint 1a– 3a

B. Tendered Amended Complaint 4a– 5a

C. Tendered Instructions 6a– 8a

D. Excerpts from Petitioner's Brief in Kentucky Court of Appeals 9a– 15a

1. Introduction 9a

2. Statement of Points and Authorities (citations omitted) 10a–11a

3. Argument III 12a–15a

E. Excerpt from Petitioner's Motion for Discretionary Review Filed in the Kentucky Supreme Court 16a–17a

APPENDIX A

(Caption Omitted)

COMPLAINT

Comes the Plaintiff, by counsel, and for his cause of action, states as follows:

1. That the Plaintiff is and the Plaintiff's decedent was at all times mentioned herein a resident of Louisville, Jefferson County, Kentucky.

2. That the individual Defendants are and were at all times mentioned herein each residents of Louisville, Jefferson County, Kentucky.

3. That the incident giving rise to this action occurred in Louisville, Jefferson County, Kentucky.

4. That on the 9th day of October, 1977, the individual defendants named herein, in the course of and acting within the scope of their duty as police officers employed by the City of Louisville, Kentucky, and pursuant to dispatch from Louisville Police headquarters, did attempt to serve and execute a Mental Inquest Warrant on the Plaintiff's decedent at his residence at 1255 Euclid Avenue, Louisville, Kentucky.

5. That prior to their attempt to execute said Mental Inquest Warrant, the individual officers named as defendants herein were aware or were made aware by the terms of said Warrant that the subject of the Mental Inquest Warrant, the Plaintiff's decedent, was 6 ft. 2 in. tall, weighed 300 pounds and might be prone to violence.

6. That those same police officers, acting willfully and/or in grossly negligent disregard of the propensity of the Plaintiff's decedent for violence, as duly noted in the Warrant, failed to exercise ordinary and reasonable care in establishing, implementing and executing safe and appropriate procedures for taking Plaintiff's decedent, an indi-

vidual presumptively under the strain of emotional illness, into custody.

7. That as a direct consequence of their willfull and/or grossly negligent failure to exercise ordinary and reasonable care in establishing, implementing and executing safe and appropriate procedures by which to take the Plaintiff's decedent into custody, these same officers, in their inappropriate efforts to obtain custody of Plaintiff's decedent, did willfully and/or with gross negligence exercise more force upon the decedent than was reasonably necessary or should have appeared to them to have been necessary in the exercise of reasonable judgment; such use of excessive force being in violation of KRS 431.025(3).

8. That as a direct result of the willfull and/or grossly negligent omission of the use of safe and appropriate arrest procedures, and the consequential use of excessive force by these officers, the Plaintiff's decedent did suffer extremely grievous and painful injury and bodily harm which resulted in his immediate death.

9. That as result of the death of Plaintiff's decedent, the estate of the Plaintiff's decedent was required to pay funeral and burial expenses for Plaintiff's decedent and furthermore suffered the destruction of the Plaintiff's decedent's power to labor and earn money, all to the damage of his estate in the sum of $175,000.00.

10. Furthermore, that as a result of the willful acts and/or gross negligence of the individual defendants as stated herein, and pursuant to KRS 411.130, the plaintiff should recover against the defendants punitive damages in the sum of $50,000.00.

WHEREFORE, the Plaintiff, Eugene Haney, Administrator for the Estate of Freddie Lee Mayes, demands judgment against the defendants named herein as follows:

1. Judgment against the Defendants jointly, severally and concurrently in the sum of $175,000.00 compensatory damages.

2. Judgment against the Defendants jointly, severally and concurrently in the sum of $50,000.00 punitive damages.

3. Interest at the rate of 7% per annum on any judgment until paid in full.

4. For all Court costs expended herein.

5. A trial by jury.

6. All other relief to which he may be entitled.

APPENDIX B

No. 78-CI-08262

JEFFERSON CIRCUIT COURT

DIVISION SIX

EUGENE HANEY, Administrator for the Estate of Freddie Lee Mayes - - - - *Plaintiff*

v.

CITY OF LOUISVILLE, Et Al. - - - *Defendants*

AMENDED COMPLAINT

For his Amended Complaint, Eugene Haney, hereby states as follows:

1. The Plaintiff reiterates each and all of the allegations of the original Complaint filed in this action, not otherwise inconsistent with the paragraphs set forth below.

2. The Plaintiff hereby amends paragraph 9 of said Complaint to allege damage to the Estate of Freddie Lee Mayes, by virtue of the destruction of the power of Reverend Freddie Lee Mayes to labor and earn money, all to the damage of his Estate in the sum of $246,667.20. Additionally, the Plaintiff claims as damages the amount of $2,278.00 as funeral and burial expenses incurred by the Estate, and such additional damages as will be proven incident to the last medical and hospital expenses incurred by the Estate.

3. The Plaintiff hereby amends paragraph 10 of the original Complaint to allege that by virtue of the willful misconduct and/or reckless behavior of the Defendants,

and each of them, and/or the use of excessive and/or unreasonably excessive force by the Defendant police officers, thereby entitle the Plaintiff to recover against the Defendants, and each of them, jointly and severally, punitive damages in the sum of $50,000.

WHEREFORE, the Plaintiff, demands judgment as prayed for in the original Complaint, as amended herein, and further demands such other relief prayed for in the original Complaint as amended herein.

APPENDIX C

No. 78-CI-08262

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

EUGENE HANEY, Administrator of the Estate of Freddie Lee Mayes - - - - - *Plaintiff*

v.

CITY OF LOUISVILLE, et al. - - - - - *Defendants*

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

1. You will find for the Estate of the Reverend Freddie L. Mayes unless you believe from the evidence that upon the occasion in question:

(a) That the defendants, and each of them, exercised that degree of care and skill ordinarily exercised by reasonably prudent police officers attempting to serve and apprehend a subject pursuant to the issuance of a mental health hospitalization warrant under circumstances like or similar to those in the instant case; and

(b) In the exercise of ordinary care and skill that the defendants, and each of them, used no more force than was necessary, or appeared to them in the exercise of a reasonable judgment to be necessary, in order to effect arrest;

in which event you will find for the defendants, and each of them.

Granted_____

Refused_____

Authority:

Tuck v. *Beliles*, 156 S. W. 883 (Ky., 1913)
Lexington v. *Gray*, 499 S. W. 2d 72 (Ky., 1973)
KRS 431.025(3)

1A. If you find that the defendant officers violated either duty "(a)" or "(b)" as set out under Instruction No. 1, then you shall find against the Defendants City of Louisville and Louisville Division of Police, as the employers of the individual defendant officers.

Granted_____

Refused_____

2. If you find that the defendants violated either duty of "(a)" or "(b)" as set out under Instruction No. 1 and further, you are satisfied from the evidence that such violation of either duty was a substantial factor in causing the death of the Reverend Freddie L. Mayes then you shall award the Estate of Reverend Freddie L. Mayes such a sum in damages as will fairly and reasonably compensate the Estate for hospital, medical and funeral expenses not to exceed on this account $ and by reason of the defendants' destruction of the Decedent's power to labor and earn money not to exceed $ the amount prayed in the Complaint.

Granted_____

Refused_____

3. If you believe from the evidence that any one of the defendant officers acted recklessly and in utter disregard of the rights and safety of the Decedent then you may in your discretion award exemplary damages against any one or all of defendant officers in the amount of $, not to exceed the amount prayed in the Complaint.

Granted_____

Refused_____

4. Ordinary care is used in these instructions as that degree of care ordinarily employed by a reasonably prudent police officer under circumstances like or similar to those in this case.

Granted_____

Refused_____

5. Nine or more of you may make a verdict. If more than nine but less than twelve of you make a verdict then each of you who so agree must sign the verdict. If your verdict is unanimous then only your foreman or forelady whom yourself shall choose may sign the verdict.

Granted_____

Refused_____

APPENDIX D-1

EXCERPTS FROM PETITIONER'S BRIEF IN KENTUCKY COURT OF APPEALS

COURT OF APPEALS OF KENTUCKY

No. 82-CA-910 I

EUGENE HANEY, Administrator for the Estate of Freddie Lee Mayes - - - - - *Appellant*

v.

CITY OF LOUISVILLE, KENTUCKY;
LOUISVILLE DIVISION OF POLICE;
OFFICER GERALD KALBFLEISCH;
OFFICER DALE LANKFORD;
OFFICER MITCHELL NOBLES;
OFFICER EVERETT PIKE;
SERGEANT GENE WALDRIDGE - - - - - *Appellees*

BRIEF FOR APPELLANT

INTRODUCTION

This is a wrongful death case involving the use of force by five (5) police officers of the City of Louisville Police Department while serving and executing a mental detention warrant. The deceased's administrator appeals from a jury verdict for the defendants.

APPENDIX D-2

[CITATIONS OMITTED]
STATEMENT OF POINTS AND AUTHORITIES

PAGE

I. The Trial Court Erred in Overruling the Appellant-Plaintiff's Motion for Judgment Notwithstanding the Verdict and This Court Should Direct That Judgment be Entered for the Appellant as to the Issue of Liability as the Verdict Is Not Supported by the Evidence. Alternatively, the Verdict Is Not Supported by Sufficient Evidence and the Verdict Should be Set Aside and a New Trial Should be Ordered Pursuant to CR 59.01. 7

II. The Trial Court Abused Its Discretion to the Substantial Prejudice of the Plaintiff and Caused a Shocking Miscarriage of Justice by Permitting Counsel for the Defendants to Ask Leading Questions of Their Own Clients and Witnesses Favorable to Them Throughout the Trial of This Case. 11

III. The Court Erred to the Substantial Prejudice of the Appellant in Giving Its Instruction to the Jury as to "Reasonable Force" in Making an Arrest Pursuant to a Mental Detention Warrant. 15

IV. The Trial Court Erred to the Substantial Prejudice of the Apellant by Excluding Testimony of Officer Hess and Dr. Bruce Danto Regarding the Procedures Used in the Execution of This Mental Detention Warrant. Furthermore, the Court Erred in Excluding Certain Documentary Evidence Offered by These Experts. 21

PAGE

V. The Trial Court Committed Error by Its Failure to Instruct the Jury on Punitive Damages. 27

VI. (a) The Trial Court Erred to the Substantial Prejudice of the Appellant by Refusing to Allow the Appellant to Amend Its Complaint at the Conclusion of All the Evidence so as to Dismiss the Appellee Officers in Their Individual Capacities; and (b), by Instructing the Jury Over the Appellant's Objection That It Must Find as to Each Appellee Officer. 29

VII. The Trial Court Committed Error to the Substantial Prejudice of the Appellant by Admitting Irrelevant and Highly Prejudicial Evidence Concerning the Validity of the Mental Detention Warrant. 31

VIII. The Trial Court Committed Reversible Error During Closing Arguments by Counsel by (a) Failing to Admonish the Jury That It Should Not Consider the Statement of Appellees' Counsel With Respect to the "Investment Power" of Money Should a Verdict be Returned in Favor of the Appellant and; (b) by Prohibiting Counsel for the Appellant From Discussing With the Jury How the Conduct of the Appellees Officers Fell Below the Standard of Conduct Properly to be Employed in Executing an Emergency Detention Warrant and; (c) by Counsel for Appellees' Argument That the Deceased's Heirs Should Not be Permitted to "Profit" From a Procedure They Instigated. 34

IX. The Cumulative Effect of All the Errors Set Out Above in Arguments II Through VIII Inclusive Was Prejudicial to the Appellant. Because of This the Appellant Is Entitled to a New Trial Under CR 59.01. 37

APPENDIX D-3

III. The Court Erred to the Substantial Prejudice of the Appellants in Giving Its Instructions to the Jury as to "Reasonable Force" in Making an Arrest Pursuant to a Mental Detention Warrant.

The trial court instructed the jury in the law of the case as follows:

> 1. It was the duty of the defendant officers Gerald Kalbfleisch, Dale Lankford, Mitchell Nobles, Everett Pike and Sergeant Gene Waldridge, as police officers of the City of Louisville, to execute the mental detention warrant concerning which you have heard evidence, by placing the decedent, Reverend Freddie Lee Mayes, under arrest
> and
>
> In so doing is was their further duty to use no more force than was necessary, or appeared to them in the exercise of reasonable judgment to be necessary, in order to effect the arrest. (T. Record p. 230-233).

The serious problem with this instruction is that it authorized the use of any kind of force so long as it was reasonable or appeared reasonable to the officers, to effect the arrest.

The problem is simply that there are strict limits to the amount and kind of force that can be used to effect an arrest in this state. This instruction does not adequately set forth those limits. It would allow the use of deadly force if the officers needed to use it to effect the arrest.

Deadly force could not under any circumstances be used in this case because no felony was involved at all. Not even a misdemeanor was involved. KRS 503.090 is clear in mandating that deadly force in law enforcement *cannot* be used *except* where the arrest is for a felony.

The only other alternative provision for the use of deadly force that could be applicable here is KRS 503.050 (2) which authorizes the use of such force when a person believes that such force is necessary to protect himself from death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat. No such circumstance is mentioned in this instruction.

In short the instruction appears to grant *carte blanche* authority to the police to use any amount of force to effect the arrest so long as it appears to him to be necessary to effect that arrest. Such is simply not the law. That is not the law for the use of force in arresting a misdemeanant and it is certainly not the law in arresting a sick person to take that person to the hospital. The error committed here in instructing the jury in the way the court did is an error that effects a federal due process right as well.

The Fifth, Fourth, Sixth and Fourteenth Amendments have been construed to forbid the use of deadly force on a fleeing felon who did not use violence in committing the felony and who posed no threat to anyone. As such, the fact that the faulty instructions allowed the jury to find for the defendant-appellees in this case where there was not even a crime that the deceased had committed is a denial of the appellant's federal as well as state rights to due process. See *Landrum* v. *Moats*, 576 F. 2d 1320 (8th Cir., 1978); *Jacobs* v. *City of Wichita*, 531 F. Supp. 129 (D. Kan., 1982). Furthermore, to treat this sick man while being "arrested" as a criminal is treated to effect his arrest raises much the same problem as is raised in *Robinson* v. *California*, 370 U. S. 660 (1962) which held unconstitutional a state statute listing narcotics addiction as a crime. At either stage—arrest or conviction — the mentally sick cannot be treated as a criminal.

There is a specific statute directly on point however which gives guidance to the type and manner of force that

can be used in the circumstance of a police officer's serving a mental detention warrant in Kentucky. KRS 202A.-200 states:

> Persons carrying out duties or rendering professional opinions as provided in this chapter shall be free of personal liabilities for such actions, provided that such activities are performed in good faith *within the scope of their official duties and in a manner consistent with accepted professional practices.* (our emphasis)

The appellant's proposed jury instruction No. 1 tendered to the court on October 16, 1981 incorporated this concept as a limiting concept on the use of force in effecting an arrest for a mental detention warrant. It stated:

> You will find for the estate of Reverend Freddie L. Mayes unless you believe from the evidence that upon the occasion in question: (a) that the defendants and each of them exercised that degree of skill and care ordinarily exercised by reasonably prudent police officers attempting to serve and apprehend a subject pursuant to the issuance of a mental health hospitalization warrant under circumstances like or similar to those in the instant case.

The appellant proved, or at least offered to prove what the standards of the police profession are in such circumstances.

The principle is settled that a specific statute controlling a narrow subject matter controls over a general statute affecting the same subject matter. *Heady* v. *Commonwealth,* Ky., 597 S. W. 2d 613 (1980); *Hollis* v. *Ky.,* Ky., ____ ____ S. W. 2d ____ ____, (March, 1983).

The appellant's tendered instruction which incorporated the guidelines set out in KRS 202A.200 controls over and

qualifies KRS 431.025(3) which states simply that "no unnecessary force or violence shall be used in making an arrest". Similarly KRS 503.090 controls over KRS 431.-025(3).

The language of KRS 202AA.200 makes plain, furthermore, that liability of the professional officers involved here depends on their actions conforming to *accepted professional practices.* Obviously such practices cannot be those limited to the criminal arrest situation. To so limit them in a jury instruction is to place vague (and incorrect) emphasis on one circumstance — that of an arrest for a crime. The professional standards involved in this case should simply be those to which a reasonably prudent officer would conform his conduct in similar circumstances. These appellees were professional persons executing a warrant authorized by KRS Chapter 202A. The law that governed their actions is the law stated in KRS 202A.200.

As this instruction was the only instruction on the use of force in this case the jury undoubtedly believed that deadly force was authorized in this case and this error clearly prejudiced the jury's decision. On this ground alone the appellant must be allowed a new trial. Unless the record demonstrates that the verdict was *not* influenced by an improper instruction, for purposes of this Court's review it must be *presumed* that it was. *Barrett* v. *Stephans,* Ky., 510 S. W. 2d 524 (1974). Further the burden is on the appellee to affirmatively show from the record that the verdict was not influenced by this erroneous instruction. *Prickard* v. *Kitchen,* Ky., 242 S. W. 2d 988 (1951).

APPENDIX E

EXCERPT FROM PETITIONER'S MOTION FOR DISCRETIONARY REVIEW FILED IN THE KENTUCKY SUPREME COURT

QUESTIONS OF LAW INVOLVED

(A) The Jury instructions given in this case were erroneous and the standard set in *City of Lexington* v. *Gray*, Ky., 499 S. W. 2d 72 (1973) is inapplicable for numerous reasons. This was an arrest of a *sick* person. He was to be taken to a hospital or doctor for help; not to a jail, as was the subject in *Gray*. After instructing the jury that it was the officers' duty to place the decedent under arrest, the instructions went on to say:

> "In so doing, it was their further duty to use no more force than was necessary or appeared to them in the exercise of reasonable judgment to be necesssary in order to effect the arrest."

This authorizes the jury to find that the officers could use any kind of force to effect this *mental detention* warrant so long as it was reasonable or appeared reasonable *to the officers*. It would allow (or would lead a jury so to think) the use of deadly force if the officers thought they needed it to effect this arrest.

KRS 503.090 speaks to justifications for the use of deadly force by law enforcement officers as against a criminal charge of assault. If such force as used in this case at bar would not have been justified as against a criminal charge, the statute should limit the amount of force that can be justifiably used in order to avoid civil liability as well. The same can be said for KRS 503.050.

The Fourth, Fifth, Sixth and Fourteenth Amendments have been construed to forbid the use of deadly force on a

fleeing felon who did not use violence in committing a felony and who posed no threat to anyone. Hence, the faulty instructions which did not limit the use of force in a case where there was not even a crime that the deceased had committed, is a denial of the decedent's federal due process rights. *See, Landrum* v. *Moats,* 576 F. 2d 1320 (8th Cir., 1978)

But most importantly, *there is a specific statute which gives guidance to the type and manner of force that can be used in serving such a mental detention warrant.* KRS 202 A.200 (now rewritten as KRS 202 A.301). The instruction tendered by the movant incorporated just such a standard. That instruction was refused. The principle is settled that a specific statute controlling a narrow subject matter controls over a general statute affecting the same subject matter. *Hollis* v. *Kentucky,* Ky., 652 S. W. 2d 61 (1983); *Bailey* v. *Reeves,* Ky., 662 S. W. 832 (1984). This specific statute governs any issue of civil liability which arises within the context of KRS Chapter 202A. Not to have given the requested instruction and to have given the instruction set forth above certainly caused irreparable prejudice to the Movant.